

# Exhibit 10

Pages 1 - 30

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Magistrate Judge

IN RE FACEBOOK, INC., CONSUMER )  
PRIVACY USER PROFILE )  
LITIGATION. )

NO. 18-md-02843 VC (JSC)

San Francisco, California  
Tuesday, April 6, 2021

**TRANSCRIPT OF PROCEEDINGS BY ZOOM WEBINAR**

**APPEARANCES BY ZOOM WEBINAR:**

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
Official Reporter

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Also Present:

**Judge Gail Andler, JAMS**  
**Discovery Mediator**

Tuesday - April 6, 2021

9:00 a.m.

P R O C E E D I N G S

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**THE CLERK:** Court is now in session. The Honorable Jacqueline Scott Corley presiding.

Calling Civil action 3:18-md-2843, In Re Facebook, Inc., Consumer Privacy User Profile Litigation.

And you can start.

**MR. LOESER:** Good morning, Your Honor. Derek Loeser from Keller Rohrbach with Cari Laufenberg, David Ko, and Chris Springer also from Keller Rohrbach.

**THE COURT:** Good morning.

**MS. WEAVER:** Good morning, Your Honor. Leslie Weaver of Bleichmar, Fonti & Auld with Matt Melamed and Anne Davis.

**THE COURT:** Good morning.

**MR. SNYDER:** Good morning, Your Honor, and good morning, Judge Andler. This is Orin Snyder from Gibson Dunn. With me on the Zoom conference are Deborah Stein, Russell Falconer, and Martie Kutscher Clark. I think that's it for our group.

**THE COURT:** Yes. That's all I see. Good morning.

**MR. SNYDER:** Good morning.

**JUDGE ANDLER:** Good morning, Your Honor. Gail Andler from JAMS.

**THE COURT:** Good morning, Judge Andler.

1 there's anything else, about the ADI documents, the app  
2 developer investigation documents.

3 And sort of let me tell you what my thinking is about  
4 that, and I did review the Massachusetts Supreme -- the Supreme  
5 Judicial Court -- I can't remember -- the highest court of  
6 Massachusetts decision; and my view is -- and also I think I  
7 have the benefit, which they didn't have, at looking at some  
8 documents in camera -- my view is, and this is what I'm going  
9 to tell you my tentative view is, is that certainly the  
10 investigation was done in anticipation of litigation, but also  
11 I can't conceive of how it wouldn't have been done otherwise as  
12 well; right?

13 I mean, Facebook wasn't going to let -- well, because they  
14 said it. When they said to the public and to their users  
15 "We're doing this to protect you," they didn't say "But our  
16 primary purpose was to protect our shareholders"; right?

17 I mean, if they were immune from liability, they still  
18 would have gone and looked back even though the platform had  
19 changed; right? There are some apps that were suspended  
20 because they were -- or you considered them to be bad actors or  
21 concerned about that, and I think that would have been done.

22 All that's to say, though, there certainly are going to be  
23 documents in there that are, A, attorney-client privilege; or,  
24 B, attorney work product. For example, if Gibson Dunn made  
25 edits to requests for information or those kinds of things,

1 that's classic work product that's not going to be  
2 discoverable. Any advice that was given is not going to be  
3 discoverable.

4 But in terms of the ADI team, at least from what I've  
5 seen, it looks like a lot of that was just generated there  
6 separate that may have then been reviewed but would have been  
7 done anyway.

8 But also the way I was looking at it in looking through  
9 and looking at those documents is that a lot of it I don't  
10 think is relevant at all, and so what I wanted to know from  
11 plaintiffs -- and this I sort of was thinking about it after  
12 reading the Massachusetts case where the AG did much more  
13 targeted discovery, and sort of get a sense from the plaintiffs  
14 because I think this will be helpful.

15 Because I'm afraid I'm just going to rule on these 20  
16 documents and then we're going to be back here with every  
17 single document. I don't think plaintiffs need every single  
18 document. There's certain information, like you say, that you  
19 need and maybe it's not even going to be privilege. There's  
20 going to be other information that may be privilege and I  
21 actually think you don't even need.

22 So what is it precisely that the plaintiffs need from that  
23 investigation?

24 **MR. KO:** Your Honor, this is David Ko. I can speak to  
25 that first.

1 I think to directly answer that question, what we need and  
2 what we've asked for and what we've identified in our brief are  
3 the facts underlying the investigation that relate to our  
4 claims, and in particular which apps were in violation or in  
5 potential violation of which Facebook policies and over what  
6 period of time these entities were in violation of these  
7 policies and the specific conduct that caused them to be in  
8 violation. And that's obviously relevant to our claims  
9 regarding whether or not Facebook allowed third parties to  
10 access user information and whether Facebook properly monitored  
11 the disclosure of this information as they claim they did.

12 And so that really relates big picture, you know, our  
13 argument that the facts underlying these communications are  
14 what we're really seeking. That really I think responds to  
15 your question most directly.

16 **THE COURT:** Right. So you don't need to know -- you  
17 don't need to know, like, when a request for information was  
18 sent. I know you've been provided responses to those so I  
19 don't think I'm saying anything. You don't even know when it  
20 was sent or re-sent or when the response was received or any of  
21 those kinds of things. You want -- well, you have been  
22 provided with the responses -- right? -- and the actual  
23 requests that went out.

24 **MR. KO:** Correct.

25 **THE COURT:** And -- okay.

1 All right. So let me hear from Facebook. With that in  
2 mind in terms of your privilege log, how does that change that  
3 or does it, or maybe you already understood that?

4 **MS. KUTSCHER CLARK:** Your Honor, it's a little bit  
5 difficult because this is the first time we're hearing this  
6 request. To date we have never received an information  
7 request. We just received a request for all of the ADI  
8 documents. So I think this is definitely something we would  
9 need to think about a little bit more.

10 I think what might make sense is if plaintiffs want to  
11 issue a request, then we can look at it in context; but what  
12 was a little bit tricky in the briefing was we were dealing  
13 with a request for all of the ADI documents and then plaintiffs  
14 said, "Well, give us the underlying facts," but we had never  
15 received a specific request for specific facts.

16 **MR. KO:** Your Honor, I think that's a  
17 mischaracterization. I think we've asked repeatedly about this  
18 information. You know, we've conferred about ADI, as you know,  
19 for well -- almost over a year now and we presented these  
20 issues to Your Honor last June. You know, you accurately  
21 ordered this privilege log to make sure that you had the proper  
22 context.

23 And throughout those discussions, we have asked over and  
24 over again that we obtain the actual facts underlying this  
25 investigation; and if there's any doubt about this, this is



1 obviously included in our briefing. We made it clear that  
2 that's what we wanted in our briefing and, in fact, we put it  
3 in our proposed order. So I'm a bit surprised that  
4 Ms. Kutscher Clark believes that this is the first time that --

5 **THE COURT:** All right. This is good because it's  
6 giving Judge Andler a hint of why I thought a discovery  
7 mediator would be useful.

8 So let me ask you this: Do you need information, then,  
9 about apps that were investigated but Facebook in the end took  
10 no action against?

11 **MR. KO:** Yeah. That's why I was very precise in  
12 saying that there could have been a potential violation. We  
13 need to know that -- we need to know the thought process, if  
14 you will. I mean, not the privileged information but to the  
15 extent there was an escalation but not an enforcement, that is  
16 still relevant because that relates to whether or not they're  
17 actually and accurately monitoring the disclosure of this  
18 information as they suggest.

19 **THE COURT:** Okay.

20 **MS. KUTSCHER CLARK:** Your Honor, I think we need an  
21 actual discovery request. I hear everything Mr. Ko is saying,  
22 and of course we've discussed this extensively, but we do not  
23 have any interrogatories asking for information like this.  
24 Right now what I'm hearing is "We want all of the facts  
25 underlying ADI," and that's a difficult thing to respond to.

1       So I think this needs to start with an actual request in  
2 writing that we can look at and evaluate, and then we can  
3 narrow it from there. But, you know, a request for any  
4 information underlying ADI or, for instance, Mr. Ko is saying  
5 any violation of a Facebook policy, Facebook has a lot of  
6 policies. Some of those policies might be relevant here, some  
7 of them might not be. So I think we need to see an actual  
8 request that we can evaluate.

9           **MR. SNYDER:** Martie, can I jump in here?

10       Judge, we agree that a narrowing makes a lot of sense and  
11 we're asking for a discovery request not to have form over  
12 substance or to delay but to facilitate and hopefully we can  
13 cut through all this because I think what you said makes  
14 absolute sense.

15       For example, we've already given them the suspensions  
16 list. That, they have. Escalations -- you know, a lot of the  
17 escalations involved my firm and legal advice; some did, some  
18 didn't. So if we see -- you know, "all the facts" is very  
19 vague. We don't know what that means because we have thousands  
20 of facts -- millions of facts, because we had investigators  
21 looking at all myriad of things. So as precise a request as  
22 they can make, then we can hopefully cut through a lot of this  
23 and give them the nonprivilege stuff that is responsive and  
24 relevant.

25       I mean, we really want to get through this ADI piece, but

1 right now we're kind of shooting in the dark because all facts  
2 underlying the investigation, having been involved in that  
3 investigation, I don't know what that means. I really don't.

4 **THE COURT:** That's not what they're -- I understand  
5 that.

6 So then my next question is, because you had suggested,  
7 I'm prepared then to rule on the motion but Facebook had  
8 said -- and, as I said, my tentative view is I don't  
9 necessarily agree with the Massachusetts -- well, I think we  
10 all agree about the dual purpose doctrine and what the  
11 Ninth Circuit rule is with respect to that. The Massachusetts  
12 court kind of -- kind of applied the same rule. I mean, they  
13 at one point did use the same rule, and without really any  
14 analysis sort of came to the conclusion that it was -- well,  
15 I'm not sure what it was. I'm not sure they were applying the  
16 same rule as the Ninth Circuit.

17 So I'm prepared to issue a ruling, but I wanted to ask  
18 Facebook about what they're -- I don't know what more you would  
19 say, but I want to make sure it's fair because I understand --  
20 it's clear that this investigation was set up with the intent  
21 to make it privileged. That's clear. That's not dispositive,  
22 but that's clear. So given that, I do want to make sure that  
23 they are able to fairly present it, and so that's why --

24 **MR. SNYDER:** Because I would respectfully disagree  
25 with the following: I think that because when it was set up,

1 it was set up for the reason you said because we wanted to  
2 assure our users that the platform, you know, was safe and had  
3 been safe in the past, but it was not set up so that we can --  
4 so that we can shroud it in a privilege. It was set up -- it  
5 was set up in a privilege way because we understood that to the  
6 extent we have to take enforcement action, it would require,  
7 you know, legal advice and the lawyers were embedded in and  
8 involved in, you know, hundreds and hundreds of decisions on a  
9 weekly, daily basis about escalation, about all manner of the  
10 investigation.

11 So it wasn't just that lawyers were put in to make it  
12 privilege. Lawyers were embedded in. In fact, we set up the  
13 investigation because it required legal advice at every turn.

14 **THE COURT:** That may be what you're saying. I don't  
15 know that I have seen -- I don't know that I have --

16 **MR. SNYDER:** I can --

17 **THE COURT:** I don't know that I've seen that. That's  
18 why I want to ask: Is there anything else that you want to  
19 present in an admissible format as opposed to the attorney --

20 **MR. SNYDER:** Yes. What I would like to do,  
21 Your Honor, because my partner Alex Southwell was literally  
22 living in Palo Alto with a number of my partners and associates  
23 for weeks if not months, in the guts of this investigation,  
24 again, not as a fig leaf but as lawyers practicing law and  
25 advising the client, I think it would be helpful for the Court

1 in its determination for us to put in an affidavit where we can  
2 outline in a nonprivilege way the extent to which legal advice  
3 was involved at every step in the investigation.

4 That might even be helpful to the plaintiffs in then  
5 identifying what it is they want to know because, as I said,  
6 all of the -- all -- I don't know what percentage but a  
7 substantial number of the decisions made by the investigators  
8 on the field were made sitting next to lawyers, texting,  
9 e-mailing with lawyers, at every turn. Hundreds -- I haven't  
10 seen our privilege log, but it must be tens if not hundreds of  
11 thousands of entries of iterative discussions between my team  
12 and the investigators because they were living together for  
13 months and months and months doing this investigation hand in  
14 glove, hand in hand, shoulder to shoulder.

15 **THE COURT:** Yeah, but don't forget what the test is in  
16 the Ninth Circuit is dual purpose and would the investigation  
17 have occurred anyway; and it's inconceivable to me that if  
18 Facebook had been immune from liability, that they wouldn't  
19 have gone in and investigated the apps to see if there were any  
20 other bad actors there.

21 That's just -- that's just inconceivable to me that, of  
22 course, they would have gone in and investigated those apps;  
23 and, therefore, my view is that those facts discovered, the  
24 facts, not the advice given, the facts would be discoverable.  
25 So I'm just saying that's what my view is, but I will allow you

1 to submit an affidavit.

2 And I know before I said no affidavits, but now having  
3 looked at it all, I think that that would be a mistake --

4 **MR. SNYDER:** Thank you.

5 **THE COURT:** -- an error on my part to rule  
6 definitively on that without doing that. And then, of course,  
7 I'll let -- but, as you said, a nonprivileged affidavit.

8 **MR. SNYDER:** Yes, Your Honor.

9 **MR. KO:** And, Your Honor, will we be allowed to  
10 respond to that affidavit?

11 **THE COURT:** Yes. You're going to get to see it and  
12 then you're going to get to respond.

13 **MR. KO:** Because I think just to preview what -- you  
14 know, Mr. Snyder, what I hear him saying is simply because of  
15 the volume, that somehow this is all privilege. But as you  
16 correctly pointed out, both the dual purpose and the facts  
17 underlying the investigation is what we are entitled to.

18 And it's clear -- I mean, I get -- I understand that it  
19 was a massive investigation, but just the sheer fact that it  
20 involved lots of communications does not take away from the  
21 fact that we would be entitled to the underlying facts  
22 regarding the escalation of these apps and the subsequent  
23 enforcement to the extent that was done. And so that's what we  
24 are seeking and I think it's pretty clear what we would be  
25 entitled to here.

1           **MS. WEAVER:** Your Honor, if I can --

2           **THE COURT:** That will shorten the privilege log if you  
3 only did the sample privilege log for six apps greatly; right?  
4 None of those e-mails about "Are you available for this  
5 meeting?" or "Can we move it?" or "Should you change the weekly  
6 report so that it has this information?"

7           **MR. SNYDER:** No.

8           **THE COURT:** You don't need any of that; right? You  
9 just want the facts. You just want what's in the report.

10          **MR. LOESER:** Your Honor, I'm going to raise my hand,  
11 and I have a question about this affidavit.

12          And if the notion is that Facebook is going to submit the  
13 affidavit of a lawyer, I'm wondering how that works in this  
14 case. That would appear to, then, be a witness.

15          And one of the central claims is a failure to monitor, and  
16 I'm a little -- I guess I'm confused as to how a lawyer  
17 testifying in this action about the work that that lawyer did,  
18 some of which would be privilege, some would not, wouldn't be a  
19 waiver of the attorney-client privilege or at least introduce a  
20 lawyer as a witness. And I'm just throwing that question out  
21 there wondering how that works.

22          **THE COURT:** I don't know. This is a perfect thing I  
23 think for you-all to discuss with Judge Andler; right? So --  
24 and I appreciate, Mr. Loeser, you being very candid about that.  
25 Essentially you're, like, warning them, "Just because we're

1 sitting here doesn't mean if you submit some affidavit, that  
2 we're not going to argue there's some waiver." And I  
3 appreciate you being transparent about that, and Facebook will  
4 have to think about that -- have to think about that.

5 And of course, then, there is the issue in Massachusetts  
6 the court did hold that it was work product but that, you know,  
7 the fact work product was discoverable in any event. And so  
8 maybe this is a way of working through that as well and getting  
9 that information. And you could, for example, show  
10 Judge Andler a lot of those documents.

11 **MS. WEAVER:** Your Honor, and on a related note, you  
12 know, to the extent that Facebook is raising as a defense in  
13 this action to the negligence claims and the invasion of  
14 privacy that they investigated and maintained users privacy,  
15 we're entitled to discovery. So it's akin to the waiver  
16 argument but it exists whether or not they put in a declaration  
17 by a lawyer. If Facebook is going to rely on the investigation  
18 as a defense, we should get discovery of it.

19 **THE COURT:** Well, that is -- sure. Of course. But I  
20 don't know if that's the case. They'll have to make that  
21 decision. Yeah, they'll have to make that decision.

22 Okay. So there we are. I've punted everything I think  
23 except that within a week Facebook has to tell you which  
24 deposition transcripts they're producing and which ones they  
25 are not.



1 And, Judge Andler, it would be great if you were able to  
2 join us on all of these hearings. I think that would be  
3 useful.

4 **JUDGE ANDLER:** I'd be happy to. I just have to have  
5 notice so that my case manager can let the counsel in my  
6 arbitrations and mediations that are scheduled through 2022  
7 know that we will have a later start in those sessions. So it  
8 will be pretty easy for Matt to do that. So if counsel just  
9 give enough notice, I'm happy to do that.

10 **THE COURT:** And we'll be by video.

11 **JUDGE ANDLER:** Great.

12 **THE COURT:** For as long as the Administrative Office  
13 of the U.S. Courts allow us to be by video, we will be by  
14 video.

15 **JUDGE ANDLER:** Thank you.

16 **THE COURT:** So I'm hoping that will be permanent.

17 **JUDGE ANDLER:** Thank you.

18 **THE COURT:** So why --

19 **MR. LOESER:** A lot of people agree with you,  
20 Your Honor.

21 **THE COURT:** Yeah. No, I know. Yeah. I have a lot of  
22 these cases right now that I'm managing that have attorneys  
23 from all across the country and it just makes so much sense,  
24 unless you're an airline.

25 So shall we meet again in, say, three weeks you think?

1           **MR. SNYDER:** Sounds good.

2           **THE COURT:** Yeah. How about April 27th? And is  
3 8:30 better?

4           Let me ask Judge Andler. We can start earlier at 8:30 if  
5 that's better.

6           **JUDGE ANDLER:** That's usually much better for me if  
7 it's not inconvenient for counsel and the Court.

8           **THE COURT:** I think we've done that. Why don't we do  
9 April 27th, then, at 8:30 a.m. And I expect between now and  
10 then you will meet and mediate your little cases.

11           All right. Great. Thanks, everyone. I hope you have a  
12 vaccine plan if you don't already have a vaccine. Soon it will  
13 be open to everyone.

14           **ALL:** Thank you, Your Honor.

15           **JUDGE ANDLER:** Thank you, Counsel, and we will be in  
16 touch so we can set something up.

17                   (Proceedings adjourned at 9:37 a.m.)

18                   ---oOo---

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, April 7, 2021

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter